interfere with the "owner's" system 100% of the time it has access to the band. This seems incentive enough to remedy the fault. Accordingly, there is little substance behind the hyperbolic assertion in Dr. Pickholtz's study that TDMA "would thoroughly pervert incentives."[41]

4. Enforcement

As Pinpoint explained in its comments, under its proposal for implementing sharing, tentative selectees would negotiate sharing arrangements in each market and submit the agreed upon plans to the Commission for approval. In cases of interference among co-channel co-situated wide-area systems, the respective sharing plan would provide the "regulations" by which the FCC would resolve the conflict. In this manner, the FCC's enforcement burden will be minimized, yet well-defined and capable of swift application.

Professor Pickholtz suggests otherwise, contending initially that the FCC will have to determine if entrants are real or a sham. With strict construction deadlines, application requirements, and the long experience of the FCC in addressing such issues, only entities interested, qualified and capable of serving the public will survive and have a right to spectrum access. Dr. Pickholtz's other concerns, criteria for allotting time slots and mechanisms to verify compliance will be worked out in the sharing group negotiations.

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[41] *Id.*

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In short, PacTel's arguments against TDMA, although embellished by impressive credentials, are transparently thin. At bottom, they say more about PacTel's unwillingness to share rather than the capability of wide-area systems to do so.

Similarly, MobileVision fails to demonstrate the infeasibility of sharing, but does so in an absolutely conclusorily manner. First, MobileVision questions the ability of systems to be synchronized with sufficient accuracy.[42] However, GPS, for example, which Pinpoint has identified as one possible standard, allows synchronization to occur with a precision of a few hundred nanoseconds. Very moderate "time" guard bands, incorporated by each licensee within his own time slots, on the order of several milliseconds to accommodate flight times across a market, should be more than sufficient for efficient systems to maintain interference-free sharing.[43] Less efficient systems might require a millisecond or so, but the total percentage of capacity is still extremely low. In any event, because the "time" guardband would come out of an operator's own time slot, it would have a strong incentive to minimize the requisite guardband.

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[42] Comments of MobileVision, L.P., PR Docket No. 93-61 at 31 (filed June 29, 1993) ("MobileVision Comments").

[43] As noted earlier, a radio signal travels 50 miles in about one-quarter of a millisecond.

Second, MobileVision complains about the absence of true asynchronous requests.[44] As Pinpoint discussed above, an operator in a sharing environment can use synchronized transmissions to accommodate the needs for asynchronous transmission without a perceptible difference with respect to the user through use of a high capacity system technology, prioritizing, and set-asides.[45]

In conclusion, there has been no showing that sharing is not feasible by any proponent of exclusivity. At most, the leading proponents of exclusivity have demonstrated their abhorrence to the notion of competition, given the fantastic windfall that exclusivity would provide them. But as detailed in the following section, sharing would best serve the public interest and it is immediately feasible.

II. SHARING AMONG WIDE-AREA SYSTEMS IS IN THE PUBLIC INTEREST

In the *NPRM*, the Commission confirmed that the 1974 interim rules authorized sharing.[46] The *NPRM* goes on to conclude that continued sharing would remain in the public interest.[47] Not only do some commenters refuse to accept these conclusions,[48]

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[44] *Id.*

[45] MobileVision's Technical Appendix conclusorily states that sharing on a TDMA basis is impossible because a wide-area system operator must retain complete control over the spectrum. MobileVision Comments, tech. app. at 15-17. While MobileVision's Technical Appendix is non-descriptive and unsupported on this point, Pinpoint notes that under its time-sharing proposal, a wide-area operator will have complete control over the use of the spectrum during its time slot.

[46] *NPRM*, 8 F.C.C. Rcd at 2504 n.29.

[47] *Id.* at 2508.

but they continue to argue as they did in RM-8013 that exclusive licensing better promotes the public interest than spectrum sharing.

Like the contentions that sharing among wide-area systems is not immediately feasible, these arguments fall well short. Simply put, in their efforts to preserve a wide-area system duopoly, PacTel and other pro-monopoly wide area proponents would have the Commission defy both logic and the law. As described below, sharing provides a multitude of benefits, including the encouragement of continued innovation, increased competition, reduced charges and promotion of consumer choice. The assertions of PacTel and others to the contrary are entirely unconvincing, despite the forest of studies, reports, papers and vitae appended to the PacTel comments.

Attached hereto is an economic analysis by Wayne Stargardt, Pinpoint's Vice President, Marketing. As detailed below, Appendix C reveals that PacTel's economics are deeply flawed. Both under the classical economic theory upon which PacTel purports to rely, and on newer, more accurate analysis, PacTel's suggestion that the public interest favors monopolization or duopolization of the LMS marketplace is simply wrong. Rather, it is apparent after even the most cursory review that economics -- like regulatory policy and technology -- offers no justification for the sort of exclusivity PacTel and others demand.

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[48](...continued)

[48] PacTel Comments at 24-32; Comments of Location Services ("LS"), PR Docket No. 93-61 at 4 (filed June 29, 1993).

A. Sharing Provides Substantial Public Interest Benefits

As Pinpoint and others have explained since the start of this proceeding, spectrum sharing provides ample tangible benefits to the public at large. The most important benefit flows from what spectrum sharing actually implies: the opportunity for competitive entry by multiple service providers. In contrast to the comments of PacTel and MobileVision, the FCC's proposal -- and Pinpoint's view -- is that spectrum sharing will permit a range of providers to offer a broad menu of new services. Moreover, the presence of competition will ensure that each provider has maximum incentive to innovate and improve its services (and its spectral efficiency). Quite simply, the weakness of the duopolists' proposal is its failure to provide these advantages.

Thus, for example, open entry implies increased competition in wide-area services. Under PacTel's and MobileVision's plan, the spectrum will support only a duopoly of providers;[49] under the Commission's sharing plan, as implemented through the TDMA scheme described in Pinpoint's opening comments, the spectrum could support many more. Rudimentary economics, common sense, and the Commission's experience elsewhere in telecommunications teach that increased competition brings reduced costs to the public. As the General Accounting Office recently noted, "[a]

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[49] SBMS, recognizing that the duopoly proposal of PacTel and MobileVision will seriously stifle competition, proposes four providers with 4 MHz of spectrum each. However, as discussed above, LMS systems using only 4 MHz are unlikely to be able to meet the needs of intelligent vehicle highway systems, as Pinpoint is attempting.

market with only two producers -- a duopoly market -- is unlikely to have a competitively set price that is at or near the cost of producing the good."[50] A fully competitive environment also makes less obtrusive FCC oversight possible, saving agency resources as well.

The open entry proposed by the Commission and endorsed by Pinpoint would also preserve greater incentives for rapid technological innovation. Monopolists have few incentives to implement new technologies; at best, duopolists -- like PacTel and MobileVision -- only a little more. By contrast, a scheme in which a larger number of entities vied for market share would provide a much greater stimulus for new ideas to enter the market. As the FCC's Office of Plans and Policy noted in the context of PCS, "[t]he competitive market formed by issuing several licenses engenders strong incentives for suppliers to develop the market quickly in advance of other competitors."[51]

Pinpoint, for example, has applied to construct a system materially different, and with greater capacity, than PacTel's. Pinpoint, alone among current applicants or licensees, will build a system designed to accommodate intelligent-vehicle highway systems, to the benefit of the public. New technologies that promise other services are much more likely to win a place in the market if the allocation and licensing scheme

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[50] United States General Accounting Office, Concerns About Competition in the Cellular Telephone Service Industry at 19 (July 1992).

[51] D. Reed, Office of Plans and Policy, Putting it All Together: The Cost Structure of Personal Communications Services, OPP Working Paper No. 28 at 53 (Nov. 1992) ("Opp Working Paper No. 28").

supports a larger number of competitors.[52] As Pinpoint noted in its opening comments, this is particularly important to meet the new IVHS requirements now being established.

The increased competition and technological innovation promised by the Commission's sharing approach invariably will lead to greater diversity of consumer choice. Under a monopoly, consumers can select only a single type of service; under most duopolies, consumers get a choice of two, although here it appears that both the PacTel and MobileVision systems are virtually identical.[53] Under the open entry scheme, consumers will be able to select from a myriad of approaches best suited to individual needs. In particular, competitive entry could preserve flexibility of the *bandwidth* used by various systems, permitting the marketplace to select the most appropriate approaches. Similar consumer choice in domestic telephony has driven the growth of numerous custom plans and offerings, individually tailored to particular demands.

In sum, the proposals of spectrum incumbents PacTel and MobileVision would require the Commission to "pick" technological winners and losers, and would force the agency to make that choice virtually in a vacuum. Indeed, the choice would be made solely because a licensee had been granted an authorization as of some particular

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[52] Further, under Pinpoint's plan, where transfers and assignments would be possible after a system is constructed, the opportunity for new technologies to be realized by new entrants gaining access through such methods is measurably greater.

[53] *See, e.g.*, MobileVision Comments at 30-31.

date in the past, a result PacTel's affiliate, PacTel Paging, abhors.[54] But, long experience has taught that the marketplace can best select the most appropriate technologies, while fostering competition that reduces consumer costs.[55] As the Commission noted regarding PCS,

> It is our goal to provide an allocation that allows for the provision of the widest range of PCS services at the lowest cost to consumers. The most desirable allocation to accomplish this goal would be one large enough to accommodate all entities interested in providing PCS services. Such an allocation would allow market forces to determine the optimum number of service providers.[56]

The Commission should not abandon its historic endorsement of competition merely because a few companies seek protection from the marketplace. As it is proposing in PCS, Pinpoint submits that the Commission should craft LMS rules and policies that preserve the opportunity for genuine competition.

B. PacTel and MobileVision's Arguments Fail to Undermine the Commission's Pro-Competitive Approach

In their desperate efforts to retain exclusive rights to provide 900 MHz wide-area services, PacTel and MobileVision raise a host of theoretical objections to

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[54] *See supra* pp. 2-3.

[55] *See* App. C at 4-6; *Allocation of the 849-851/894-896 MHz Bands*, 5 F.C.C. Rcd 3861, 3865 (1990) (*"Air-ground Telephone Service"*), *recon.*, 6 F.C.C. Rcd 4582 (1991).

[56] *Establishment of New PCS Services*, 7 F.C.C. Rcd 5676, 5690 (1992).

competition in general and a competitive LMS environment in particular. Aided by myriad (and thick) studies, the duopolists essentially urge the Commission to "trust them," for PacTel and MobileVision know, and will serve, the public interest. This point of view has no merit; each individual contention is answered below.

Initially, however, it is worthwhile noting the similarities between PacTel's arguments (and MobileVision's) today and those formerly made by AT&T in defending the government antitrust suit in the 1970s and 1980s. Desperate to maintain a monopoly that increasingly defied both technology and economics, AT&T and PacTel each hired academics to assert the "chicken little" defense: the sky will fall if competition is permitted. In pre-divestiture stage of the AT&T case, official Washington was blanketed with arguments about "cherry picking," universal service and -- in the ultimate *reductio ad absurdum* -- the claim that a plastic cover on a telephone directory would cause "harm to the network."

PacTel apparently learned well from now discarded practices of its former corporate master, but its plea should be treated no more seriously. Regardless of how many "independent" studies say the contrary, the public interest has been better served through telecommunications competition and open entry, as the Commission has proposed herein. PacTel and MobileVision attempt to turn back the clock and second guess decades of FCC experience with pro-competitive policies, but the Commission should not be tempted by any of their points.

First, PacTel boldly claims that competition and multiple entry in itself will not benefit consumers.[57] PacTel ignores the 1970s, 1980s and the first part of the 1990s: it is now accepted beyond cavil that competition lowers prices and increases choice to the benefit of the public.[58] Indeed, PacTel itself agrees in other contexts: in Docket 93-144, PacTel Paging states that, rather than giving licensing advantage to incumbent license holders, "[t]he public interest is better served by adopting policies which permit open entry and full competition."[59] Similarly, in the proceeding reviewing the telephone company cable television cross-ownership rules, PacTel noted that opening up the entry into the effectively monopolized cable television market would "stimulate competition in cable television services and result in greater public interest benefits to consumers" and "will increase the sources and dissemination of information."[60]

Second, PacTel and MobileVision challenge the Commission's conclusion that open entry in LMS will increase innovation; indeed, PacTel brazenly claims that open entry will destroy the incentive to innovate.[61] To the contrary, long-standing experience -- discussed above -- suggests that open entry furthers innovation because

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[57] PacTel Comments at 40.

[58] PacTel's own appendix concedes this. *See* App. C at 7.

[59] PacTel Paging Comments at 5.

[60] Comments of Pacific Telesis Group Pacific Bell and Nevada Bell, CC Docket No. 87-266 at 24, 25 (filed Feb. 3, 1992). PacTel also asserted that the FCC should "avoid focusing on any specific medium or architecture which 'freezes the frame' on technology." *Id.* at 8. Exclusivity conferred on existing licensees, *i.e.*, MobileVision and PacTel, would do just that just as Pinpoint and others are poised to introduce dynamic and advanced innovative AVM services.

[61] PacTel Comments at 39.

the additional service providers must provide something new to distinguish themselves to consumers.[62] The interest, and pending applications of Pinpoint and Southwestern Bell,[63] for example, demonstrate better than any theoretical study that open entry, not duopoly, fosters consumer choice and innovation.[64]

In a related point, PacTel claims that multiple competitors will promote "uncertainty" that will stifle investment.[65] Nonsense. In the current environment, which PacTel claims provides for exclusive frequency assignments,[66] PacTel has been allotted *years* to construct and only has six systems operating. During nearly the same period, MobileVision apparently has not managed any commercial installation. Either PacTel is suffering under uncertainty today in a purportedly exclusive regime, or its proposed rule changes will not help. Most likely, artificial constraints on the number of licenses do not necessarily speed service to the public. As the Office of Plans and Policy noted in the context of PCS, "a policy that seeks to minimize investment

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[62] *See* App. C at 9-11, noting that different competitive services providers will invariably utilize different technologies.

[63] *Cf.* SBMS Comments at 7-8.

[64] Indeed, the Commission found in the PCS context that "a minimum three service providers per market will be necessary to ensure a wide and rich range of PCS services that meet consumer needs at reasonable prices." 7 F.C.C. Rcd at 5690.

[65] PacTel Comments at 38, app. 3 at 5.

[66] North American Teletrac and Location Technologies, Inc.'s (PacTel) Application for Freeze, PR Docket No. 93-61 at 7 (filed May 21, 1993).

uncertainty by artificially constraining the availability of PCS licenses is not certain to speed up the rollout of PCS."[67]

Fourth, PacTel and MobileVision claim that multiple entry increases fixed costs, requiring greater infrastructure investment to provide the same capacity.[68] AT&T made the identical argument about duplicative long-distance facilities. But, neither AT&T then, nor PacTel and MobileVision now, account for the fact that the facilities inevitably are not duplicative: different service provider provide diverse services, meeting consumer needs in different ways.[69] Moreover, multiple service providers stimulate greater consumer demand for the service, thereby allocating the fixed costs over a greater base. No one would today argue the MCI or Sprint are needlessly duplicative, and Pinpoint, Southwestern Bell and other LMS applicants will not be either.

Similarly, PacTel and MobileVision claim that multiple entry increases the required overhead, decreasing spectrum efficiency.[70] The simple answer to this is: not much. With a competitive market, spectrum efficient sharing techniques will permit more efficient use of the available spectrum.[71] As discussed above, in the TDMA scheme proposed by Pinpoint, the minimal additional overhead requirements

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[67] OPP Working Paper No. 28 at 53.

[68] Pactel Comments at 36, app. 3 at 4; Mobilevision Comments at 39.

[69] *See* App. C at 9-11.

[70] PacTel Comments at 37; Mobilevision Comments at 39.

[71] *See* App. C at 8-9.

are far outweighed by the benefits of increased competition, technical innovation, and the potential for exponentially greater capacity.[72] Similar arguments were proffered in seeking a monopoly in the air-to-ground telephone rulemaking, and they were rejected there.[73]

Next, PacTel and MobileVision resist the Commission's inquiry about dividing the bandwidth for wide-area systems to, perhaps, four systems of four megahertz each.[74] Here, Pinpoint agrees that splitting the band is not in the public interest, because both ranging accuracy and capacity is exponentially proportional to available bandwidth.[75] However, it is worth noting that the protests of PacTel and MobileVision ring hollow: at present, each of those systems is using only four megahertz. Not only do PacTel and MobileVision seek exclusivity, therefore, they attempt to block entry on spectrum not even in use.

Ultimately, conceding the merits of competition and multiple entry, PacTel and MobileVision also argue that the current marketplace is competitive, citing non-LMS services, such as GPS and LoJack.[76] Indeed, MobileVision and PacTel go to such an extreme in their rush to lock up spectrum that they actually denigrate their own

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[72] *See generally* Technical Appendix.

[73] *Air-ground Telephone Service*, 5 F.C.C. Rcd at 3869.

[74] PacTel Comments at 37; MobileVision Comments at 36-37.

[75] For this reasons, Pinpoint and others have urged the Commission to open the *entire* 902-928 MHz band to both wide-area and local-area systems.

[76] PacTel Comments at 39 n.36; MobileVision Comments at 38-39.

offerings.[77] But as Pinpoint has explained,[78] the public interest is better served by many types of location services. Each technology has its own advantages and drawbacks, and consumers should be permitted the widest possible choice. Pinpoint, for example, is the only applicant or licensee that proposes to offer, or is capable of offering, very high capacity IVHS services in the 902-928 MHz band.[79] Eliminating multiple entry will eradicate the public's ability to receive this important service.

Finally, PacTel makes much over the fact that exclusivity used in other services, including land mobile and paging.[80] This is, of course, true. But spectrum sharing is also used in other services, in part because of the potential for multiple entry.[81] Moreover, whatever the merits of exclusivity when allocating and assigning virgin spectrum, non-exclusivity has additional value in an environment where the spectrum is already shared among several types of uses, as is the case here. In addition, it is worth remembering that the frequencies at issue are two 8 MHz bands, effectively nationwide blocks of bandwidth given the speculative efforts of PacTel and MobileVision in a

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[77] MobileVision claims that "[t]he marketplace, according to market research studies, is only minimally interested in receiving stand alone services such as stolen vehicle recovery." MobileVision Comments at 38. PacTel characterizes systems using 4 MHz as "useless," yet concedes it is using only that much spectrum. PacTel Comments at 23-24; *see also* PacTel Reply to Oppositions to Application for Review, No. 342513 at 9 (filed June 21, 1993) (PacTel is currently using only 4 MHz).

[78] *See* Opposition of Pinpoint Communications, Inc., RM No. 8013 at 7-8 (filed July 23, 1992)("Pinpoint Opposition").

[79] Pinpoint Comments at 6-7.

[80] PacTel Comments at 41-46.

[81] For example, the air-to-ground telephone services and the radiodetermination satellite service.

shared spectrum setting, a huge amount per licensee in comparison to other allocations such as 900 MHz PCS *e.g.*, 50 kHz nationwide channels.[82]

In sum, the same Luddite arguments of PacTel and MobileVision failed to stop the development of domestic telecommunications competition in the United States, which is now being exported throughout the globe. As the American public enjoys the benefits of such multiple entry, the Commission should not revert to monopoly regulation of what will become one of the most important telecommunications services of the 21st century. Simply put, LMS is not a "natural duopoly" and should not be regulated as one. In order best to promote the growth of LMS, the Commission should reject the arguments of PacTel and MobileVision, reject exclusivity, and authorize open entry in LMS through the sort of window filing proposed by Pinpoint.

III. THE COMMISSION'S TEMPORARY EXCLUSIVITY PROPOSAL WOULD VIOLATE THE *ASHBACKER* DOCTRINE AND ITS UNDERLYING POLICIES

The current licensing of wide-area AVM systems is on a shared basis. Pinpoint has applications on file for initial system licenses in twenty cities which, under the existing rules, may be granted despite the fact that MobileVision is already licensed on that same spectrum. The Commission has proposed to continue the sharing approach, and, as the above discussion shows, Pinpoint agrees this will best serve the public interest. In considering alternatives for future licensing of AVM/LMS systems,

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[82] *See* Narrowband Personal Communications Services, FCC 93-329 (July 23, 1993).

however, the Commission has proposed the alternative of granting existing wide-area licensees exclusive use of the 904-912 and 918-926 MHz bands for a period of five years, after which time the Commission would resume licensing wide-area systems on a non-exclusive basis, but require new licensees to protect existing systems.[83] As Pinpoint explained in its opposition to PacTel's petition for rulemaking, and in its initial comments on the *NPRM*, exclusivity -- even on a purportedly temporary basis -- would establish a *de facto* nationwide duopoly.[84] Because PacTel and MobileVision, the potential duopolists, already are licensed at almost fifteen hundred sites for the two 8 MHz bands in all of the largest metropolitan areas in the country and beyond, the Commission's exclusivity proposal would effectively authorize each of them exclusive use of 8 MHz bands on a nationwide basis.[85]

Given the extraordinary "leg-up" the five-year duopoly would afford PacTel and MobileVision, and in light of PacTel and MobileVision's intense opposition to sharing,[86] it is extremely unlikely that at the conclusion of the five-year exclusivity period they would cooperate in spectrum sharing initiatives with new AVM licensees,

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[83] *NPRM*, 8 F.C.C. Rcd at 2506.

[84] *See* Pinpoint Opposition at 9; Pinpoint Comments at 13-14.

[85] *Id.* at 13-14.

[86] Either PacTel, MobileVision, or both have sought to oppose virtually every license grant or application in the shared spectrum environment in the 904-912 and 918-926 MHz sub-bands in the past year, generally without procedural authority and often despite the lack of a factual basis for doing so. *See, e.g.*, Petitions to Deny of Ameritech (MobileVision), File Nos. 295053 and 295060 (filed Aug. 21, 1992); PacTel Petition to Deny Applications of Pinpoint Communications, Inc., File Nos 347483-347502 (filed Mar. 17, 1993); PacTel Petition For Reconsideration, File No. 342513 (filed Mar. 17, 1993); PacTel Application for Review, File Nos. 342513 etc. (filed May 23, 1993).

especially if the latter are required to prevent interference to their systems.[87] Indeed, their comments include not one shred of evidence to the contrary. Thus, "temporary" exclusivity would permanently preclude entry by competitors into the AVM market and deprive the public of the myriad benefits accrued from open entry into AVM/LMS.[88]

Since its initiation nearly twenty years ago, AVM licensing consistently has been conducted on a flexible, shared spectrum basis, allowing all interested and qualified parties an equal opportunity to construct and operate AVM systems.[89] Were the Commission to implement its exclusivity proposal retroactively, it would, in a single stroke, render the applications of Pinpoint and other wideband wide-area systems mutually exclusive with the applications of PacTel and MobileVision previously-granted in a shared spectrum licensing regime -- and deny them. In doing so, the Commission effectively would establish retroactive cut-off dates for hundreds of locations where PacTel and MobileVision are already licensed, denying consideration to pending applications and the opportunity of other potential competitors to file competing applications. As discussed below, such a retroactive cut-off violates the rights guaranteed under *Ashbacker v. FCC*,[90] as well as the twin principles upon which it is premised: regulating use of the radio spectrum in a manner that will best serve the

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[87] Pinpoint Comments at 13-14.

[88] Pinpoint Opposition at 13-14; Pinpoint Comments at 13.

[89] *See* 47 C.F.R. §§ 90.173(a), 90.239 (1992); *NPRM*, 8 F.C.C. Rcd at 2502, 2504.

[90] 326 U.S. 327 (1945).

public interest, and preserving fairness in the licensing process. Because the temporary exclusivity proposal is legally untenable under *Ashbacker*, the Commission should abandon it and adopt a licensing scheme that allows consumers to enjoy the public interest benefits afforded by a shared spectrum, competitive, open-entry AVM environment with well established cut-off procedures.

A. The Commission's Temporary Exclusivity Proposal Would Violate Rights to Meaningful Consideration Guaranteed By *Ashbacker* and Correlative Due Process Rights

Qualified applicants must be given comparative consideration before the Commission grants a mutually exclusive license application.[91] Closely associated and inextricable from the *Ashbacker* decision are applicants' due process rights to proper notice of cut-off of pre-existing privileges. If the Commission were to implement its exclusivity proposal, the applications of Pinpoint and other wideband applicants would be denied any "hearing" or meaningful consideration, and would be cut-off without prior notice. Retroactive exclusivity, therefore, would defy *Ashbacker* by short-circuiting its requirement for equal consideration and abrogating correlative due process rights.

In *Ashbacker*, the Court considered whether, in granting one of two mutually exclusive applications and setting the other for hearing, the Commission denied the latter applicant the meaningful consideration to which it was entitled under the

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[91] *Id.*

Communications Act.[92] The Court found that by granting the first application before considering the merits of the latter, the Commission effectively had unlawfully precluded or "cut-off" the second application from meaningful consideration.[93] The *Ashbacker* Court focused on whether an applicant's right to a hearing on its application "[had] as a practical matter been substantially nullified by" the actions of the agency.[94]

The Commission's proposal to afford exclusive use of spectrum to existing wideband licensees falls squarely within the *Ashbacker* decision, as it would render Pinpoint and other wideband system applicants mutually exclusive with PacTel and MobileVision and, simultaneously, deny them a "hearing" or any form of meaningful consideration before the Commission.

PacTel's request for exclusivity, the basis for the Commission's proposal, could be deemed a request for modification of PacTel's and MobileVision's existing AVM licenses. While the Commission may modify licenses,[95] it cannot grant modifications that will preclude other interested parties from comparative consideration by the Commission.[96] In *Cheyenne*, the Commission considered a request by a Class A FM

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[92] *Id.* at 329-30.

[93] *Id.* at 330, 333-34.

[94] *Id.* at 334 (footnote omitted).

[95] 47 U.S.C. §§ 316(a); 309(a) (1988).

[96] *Amendment of Section 73.202(b), Table of Assignment, FM Broadcast Stations (Cheyenne, Wyoming and Terrytown, Nebraska)*, 62 F.C.C. 2d 63 (1976) (Report and Order) ("*Cheyenne*").

licensee to modify its license to specify operation on a newly assigned Class C channel in its community, Cheyenne, Wyoming, where other parties sought to apply for the new assignment. As in the instant case, the request for license modification was opposed as an attempt to freeze out the competition.[97]

Applying the *Ashbacker* doctrine, the Commission found:

> By granting petitioner's request we would be effectively foreclosing the filing of other applications by interested persons for the newly assigned channel after the effective date of the modification. In *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327 (1945), the Supreme Court decided that the Commission could not grant the application of one party for a new frequency without first giving comparative consideration to other mutually exclusive applications filed therewith. Without a hearing in which all mutually exclusive applications are given comparative analysis, the Commission could not make the public interest finding as to which applicant was the best qualified to render service in the public interest.[98]

To avoid cutting off the rights of other interested parties who might want to apply for the new channel, the Commission therefore denied the modification request, in the belief that "the public interest would be best served by affording other interested persons an equal opportunity to file an application and to be given consideration for the new channel."[99]

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[97] *Id.* at 65.

[98] *Cheyenne*, 62 F.C.C. 2d at 67 (footnotes omitted).

[99] *Id.*

As in *Cheyenne*, "modifying" PacTel's and MobileVision's licensees to render them exclusive through adoption of the Commission's proposal would unlawfully deny other interested parties such as Pinpoint, an equal opportunity for their applications to be given consideration, as required under *Ashbacker*.

The Commission's exclusivity proposal is also analogous to a retroactive cut-off which similarly deprives wideband system applicants of the consideration before the Commission that is mandated by *Ashbacker*. Affording exclusivity to existing wideband licensees, as discussed above, retroactively would render the applications of Pinpoint and other wideband system applicants mutually exclusive with the previously-granted applications of PacTel and MobileVision.[100] The Commission, however, would not engage in any re-licensing of these markets. Because both pending and prospective applications would be instantly and retroactively cut-off without opportunity for Commission consideration of these applications as required under the *Ashbacker* doctrine,[101] the exclusivity proposal cannot be implemented lawfully.[102]

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[100] Because of the open-entry licensing scheme that has characterized AVM licensing for the last twenty years, "mutually exclusivity" is a licensing concept that has never applied in the 902-928 MHz band. Therefore, there has never been an opportunity for Pinpoint to file applications that were "mutually exclusive" with those of PacTel and MobileVision. In an exclusive licensing regime, the grant of an exclusive license following proper procedures would, in fact, preclude the acceptance of future applications. That is not the case here, as the PacTel and MobileVision licenses have no preclusive effect.

[101] The retroactive result of the Commission's exclusivity proposal renders it wholly unlike licensing on an exclusive basis through, for example, comparative hearings or by lottery, where every interested and qualified wideband applicant, in one fashion or another, would be given the opportunity to participate in the licensing process before the Commission actually selects the exclusive licensees. While exclusive licensing in this fashion still would abrogate the public interest benefits of licensing on a shared spectrum, competitive basis -- and Pinpoint therefore does not support it -- it at least would not defeat the

(continued...)

In addition to undermining the rights of applicants to meaningful Commission consideration, the exclusivity proposal would also violate the due process rights of interested parties to receive proper notice of valuable privileges subject to cut-off. The Commission's exclusivity proposal, however, shamelessly would deny Pinpoint and other wideband system applicants such notice. The *NPRM's* licensing alternative, therefore, is legally untenable on this basis as well.

The Commission's duty to provide proper notice of actions that rescind long-standing and pre-existing privileges is well settled. For example, in *Reeder v. FCC*,[103] the court found that the FCC had not provided adequate notice of new rules governing the submission of counterproposals for an omnibus proceeding for allocating new FM channels involving intermediate mileage separation requirements. The notice provided did not indicate that the Commission was planning to abandon its long-standing policy permitting channel substitutions in order to accommodate upgrade plans. As undoubtedly it would do in this case, the court rejected the Commission's

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[101](...continued)
underlying mandate of *Ashbacker* that mutually exclusive applications be afforded some kind of meaningful consideration by the Commission.

[102] The instant case is distinguishable from cases where Commission decisions challenged on *Ashbacker* grounds have been upheld because the applications at issue in those cases did not meet valid eligibility requirements. *See United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Aeronautical Radio Inc. v. FCC*, 928 F.2d 428 (D.C. Cir. 1991). The applications of Pinpoint meet the eligibility requirements. Moreover, as PacTel has correctly noted, a licensee should not receive rights retroactively merely because it was licensed as of a particular date. PacTel Paging Comments at 5 n.11.

[103] 865 F.2d 1298 (D.C. Cir. 1989).

attempt to eliminate a long-standing preexisting right without providing adequate notice beforehand.[104]

Conversion of the current open-entry licensing regime to the exclusive licensing model proposed would violate the due process rights of both existing and prospective wideband system applicants. Under the proposal, the Commission retroactively would cut-off pending and future wideband system AVM applications for locations already licensed to PacTel and MobileVision. Because competing applications would be rendered mutually exclusive once the Commission granted exclusivity to PacTel and MobileVision, the dates that PacTel and MobileVision filed their applications to provide AVM would become the retroactive application cut-off dates for these markets. Obviously, because these cut-offs would be established retroactively, Pinpoint and others would be afforded no prior notice, and no opportunity to file mutually exclusive competing applications.

Given the unlawful manner in which important and well-established due process rights would be circumvented by an exclusivity regime, the Commission should reject this alternative proposal.

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[104] *See also Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1560-61 (D.C. Cir. 1987) (FCC required to reinstate application for cellular unserved areas for failing to provide applicant sufficient notice of cut-off rules governing such applications); *Ridge Radio Corp. v. FCC*, 292 F.2d 770, 773 (D.C. Cir. 1961) (public notice of cut-off date must "fairly advise prospective applicants of what is being cutoff by the notice").

B. The Commission's Exclusivity Proposal Would Violate the Fundamental Fairness Issues Underlying Due Process and *Ashbacker* Rights

In addition to unlawfully violating *Ashbacker* and associated due process requirements, the Commission's proposal, endorsed by MobileVision and PacTel, conflicts with the underlying public policy and the driving forces behind *Ashbacker* and due process principles: regulating use of the radio spectrum in a manner that will best serve the public interest and preserving fairness in the licensing process.

In guaranteeing the rights of mutually exclusive applicants to meaningful consideration before the Commission, the *Ashbacker* Court recognized that comparative consideration is the best means by which the Commission can discharge its fundamental duty of selecting the use of scarce public resources in a manner that will best serve the public interest.[105] Applying the public interest framework underlying the *Ashbacker* decision to the Commission's exclusivity proposal reveals a gross conflict. Comparative hearings at least allow the Commission to examine and compare the characteristics of different service proposals and technologies. Lotteries at least afford an equal chance to all applicants who meet threshold qualifications to be licensed.

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[105] *See New South Media Corp. v. FCC*, 685 F.2d 708, 715 (D.C. Cir. 1982) (quoting *Community Broadcasting Co. v. FCC*, 274 F.2d 753, 758-59 (D.C. Cir. 1960)) (recognizing that the "court has scrutinized closely Commission contentions concerning the need for new or continued service, or for expeditious administrative proceedings, to assure that FCC action does not stray from '[t]he basic teaching of . . . *Ashbacker*. . . that comparative consideration by the Commission and competition between the applicants is the process most likely to serve the public.'").*See also* 47 U.S.C. 157(a) (Commission should pursue policy of encouraging the provision of new technologies and services to the public).

allegations in a recent federal lawsuit by the former general partner, Ameritech.[109] Developers such as Pinpoint will be poised to offer services in the near future. Pinpoint is in the midst of conducting experimental testing, and is on the cusp of deploying its spectrum sharing, innovative and uniquely high capacity system.[110] By capitulating to the wholly unwarranted and self-serving demands of PacTel and MobileVision for exclusivity the Commission will seriously abrogate numerous important benefits of a competitive AVM industry capable of meeting the goals of the Intelligent Vehicle Highway Systems Act.[111] Such a course would be in contravention of the public interest underpinnings of the *Ashbacker* decision, and to the detriment of the public.

Fundamental notions of fairness that underlie *Ashbacker* and run through related due process principles implicated in *Ashbacker* are also compromised by the Commission's exclusivity proposal. By altering the character of AVM licensing from spectrum sharing to exclusive use, without proper notice, the Commission's proposal would strip-away Pinpoint's and others' pre-existing opportunity to provide AVM

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[109] In this suit, Ameritech sought damages for breach of contract and fraud in connection with MobileVision's failure to develop and deploy AVM systems in the Chicago and Boca Raton areas. *See American Mobile Data, Inc. v. Mets, Inc.*, No. 93C 1261 (N.D. Ill. Mar. 22, 1993). While it is Pinpoint's understanding that Ameritech has withdrawn the suit, it nevertheless reveals the stunted stage of development of MobileVision's AVM systems.

[110] Southwestern Bell is also in the midst of conducting experimental testing of its wideband AVM/LMS operation, and also is poised to deploy its system, albeit the capacity of the system is not compatible with most IVHS applications.

[111] As explained in the Technical Appendix, the Pinpoint system alone is poised to meet the high capacity demand of IVHS in large metropolitan area. *See* Technical Appendix.